Baudot format used in TTYs. In its rules related to Telecommunications Relay Services, the FCC requires such services to be capable of communicating with both ASCII and Baudot formats.[53] In order to promote the technology that will ultimately increase access, the FCC should not simply look at which kinds of SCPE are subsidized by state and local governments,[54] but should create incentives, through its compatibility criteria, for the use of SCPE that is consistent with new telecommunications technologies.

TIA also is concerned that, under the *NPRM*, manufacturers of telecommunications equipment are required to bear too much responsibility for compatibility. Under the *NPRM*, the entire burden for achieving compatibility is placed on the manufacturer. TIA believes it is unrealistic to expect manufacturers to create compatible products on their own; the burden for achieving compatibility should be shared with manufacturers of SCPE and peripheral devices.

D. The FCC Should Adapt The Definition Of "Readily Achievable" To The Telecommunications Context.

"Readily achievable" is defined under Section 255 as "easily accomplishable and able to be carried out without much difficulty or expense."[55] TIA whole-heartedly supports the FCC's tentative decision to adapt the definition of "readily achievable," incorporated by

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[53] 47 C.F.R. § 64.604(b)(1).

[54] *See NPRM* ¶ 90 (suggesting such a criterion for "commonly used").

[55] 47 U.S.C. § 255(a)(2) (referencing Section 301(9) of the ADA, 42 U.S.C. § 12181(a)).

reference from the ADA, to the unique context of telecommunications.[56] Under the FCC's proposed approach, "the ADA factors should guide, but not constrain . . . development of factors that more meaningfully reflect pertinent issues related to telecommunications equipment and services."[57]

In the *NPRM*, the FCC proposes a three-part framework for determining whether a particular telecommunications accessibility feature is "readily achievable":

- Is the feature feasible?
- What would the expense be of providing the feature?
- Given its expense, is the feature practical?[58]

In the *NPRM*, the FCC requested comment on these proposed factors, especially their "practical implications," and "effect on the development and marketing of accessibility features, on the pace of innovation, and on the administrative costs associated with implementation and enforcement measures."[59]

TIA agrees with many of the concepts that underlie the FCC's proposed three-part approach. TIA wishes to highlight several points: first, TIA strongly supports consideration of technical feasibility in the "readily achievable" analysis; second, TIA believes that the

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[56] *NPRM* ¶¶ 98, 99.

[57] *NPRM* ¶ 98.

[58] *NPRM* ¶ 100.

[59] *Id.*

cumulative costs of access features should be part of the consideration of the expense of providing accessibility; third, TIA endorses the FCC's consideration of the practicality of accessibility features; and finally, TIA proposes that what is "readily achievable" be limited by one further concept: fundamental alteration.

1. Technical feasibility should be considered as part of the "readily achievable" analysis.

TIA supports the FCC's recognition that the practical application of achievability in the context of telecommunications includes the concept of technical feasibility.[60] TIA commends the FCC for recognizing that technical feasibility is a distinct, express factor used in determining what is "readily achievable."[61] As a practical example, one TIA member discovered the impact of the limits of technical feasibility in the context of the technical specifications for volume control. While the FCC technical specifications currently require a volume control with a minimum gain of 12 dB,[62] the Access Board's Guidelines require manufacturers to provide adjustable gain up to a minimum of 20 dB. Evaluation of the same 3 models of telephones that were used by the consultants referenced in the Access Board's Guidelines revealed that the

[60] *NPRM* ¶ 101.

[61] *See NPRM* at ¶ 102 (discussing Access Board's decision not to recognize feasibility as a separate factor).

[62] 47 C.F.R. § 68.317.

phones could not accommodate both the 20 dB standard and the other telephone performance standards required by the FCC.[63]

TIA further agrees with the FCC's tentative conclusion that retrofitting of products that have already been introduced to market without certain accessibility features should not be required. As the Access Board and the TAAC recognized, the requirement that the technical feasibility of access features be reassessed every time a product is upgraded in a manner that substantially affects its functionality will ensure that accessibility features can be incorporated into products that remain popular in the marketplace for long periods of time.[64] TIA agrees with the FCC's tentative conclusion that technical feasibility should not be reassessed after a product is introduced to market.[65] The FCC's proposed rules should make it clear that because Section 255 imposes compliance obligations on the design, development, and fabrication of equipment and CPE, technical feasibility must be assessed at the time the design, development and fabrication process for a new product or a substantial upgrade for an existing product begins. Retrofitting products that have already begun the design process should not be required under any circumstances.[66] Any requirement to retrofit would waste limited compliance resources, delay product time to market, and slow the pace of innovation in a rapidly changing marketplace where products quickly become obsolete. Any enforcement strategies utilized by

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[63] *See* Section III.B.4., n. 40, *supra.*

[64] 36 C.F.R. § 1193.2; TAAC § 4.2.

[65] *See NPRM* ¶ 120.

[66] *See id.*

the FCC should be proactive rather than punitive, in order best to promote the goal of increasing the availability of accessible equipment and CPE in the marketplace.

2. The consideration of "expense" as part of the "readily achievable" analysis should include cumulative costs of features that enhance accessibility, as well as opportunity costs.

TIA agrees that consideration of the expense of providing accessibility features is a necessary part of the "readily achievable" analysis. TIA urges the FCC to include consideration of cumulative costs of accessibility features in that analysis. There is support for this approach in the ADA: in connection with the "readily achievable" analysis with respect to barrier removals, the Department of Justice has stated that "it is appropriate to consider the cost of other barrier removal actions as one factor in determining whether a measure is readily achievable."[67]

By contrast, the FCC's proposal does not explicitly account for the costs of including other accessibility features in the "readily achievable" analysis. By adopting the Access Board's definition, which appears to require an independent "readily achievable" evaluation for each accessibility feature, the FCC is downplaying the cumulative costs of accessibility features. This approach is unrealistic.

Additionally, TIA agrees with the FCC that it is appropriate to consider several other expenses in the "readily achievable" analysis. For example, there are significant

[67] DOJ Preamble, 28 C.F.R. Part 36, App. B.

opportunity costs associated with increasing accessibility features. Time and money spent developing accessibility features are necessarily diverted from other innovation. Moreover, accessibility features affect battery life, the size of a product and its memory. Finally, development of accessibility features is costly in terms of development time, which could delay introduction of new products into the market.

3. TIA supports consideration of "practicality" in the "readily achievable" analysis.

As the third prong of its "readily achievable" analysis, the FCC proposes consideration of the practicality of incorporating a particular accessibility feature.[68] The practicality consideration would include factors such as: (1) the resources available to meet the expenses associated with accessibility; (2) the potential market for the product or service; (3) the degree to which the provide would recover the cost of the accessibility feature; and (4) issues regarding product life cycles. TIA supports the consideration of practicality as part of the "readily achievable" determination. TIA believes the goals of accessibility cannot be divorced completely from practical realities in the marketplace; thus, practical considerations are appropriate. As TIA has noted, however, TIA disagrees that cost recovery is an appropriate consideration.[69]

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[68] *NPRM* ¶¶ 106-121.

[69] *See* Section III.A.3., *supra.*

4. The concept of "fundamental alteration," used in the ADA, should be modified to the telecommunications context and considered to insure that equipment and CPE remain consistent with the fundamental characteristics of functionality and price required by the market segment that the products are designed to serve.

TIA asks the FCC to recognize that what is "readily achievable" is further limited by the concept of fundamental alteration, taken from the ADA. TIA proposes that Section 255 not be applied such that fundamental characteristics of equipment and CPE, which include functionality and price, are required to be changed by accessibility features.

In the preamble to the ADA regulations, DOJ determined that fundamental alterations were not required by the "readily achievable" definition. DOJ reached this conclusion by drawing a comparison to the "undue burden" standard, which defines the scope of a public accommodation's duty to provide "auxiliary aids and services" such as sign language interpreters, text telephones, and assistive listening devices. The undue burden and "readily achievable" determinations depend upon the same factors; however, the undue burden standard requires a higher level of effort to achieve compliance than does the "readily achievable" definition.[70] Since the undue burden standard excuses actions that would fundamentally modify goods and services, DOJ concluded that the "readily achievable" definition would excuse such actions as well, even though this is not specifically stated in the regulations.[71]

The Access Board, in its guidelines, recognized that the concept of fundamental alteration was useful and appropriate in determining whether accessibility is "readily

[70] 28 C.F.R. Part 36, App. B (commenting on § 36.104).

[71] *See id.*

achievable." The Access Board acknowledged that under the "readily achievable" standard, fundamental alteration of products to provide access is not required.[72] Although the FCC's proposal alludes to the fundamental alteration concept,[73] the FCC does not expressly recognize this factor from the ADA. TIA believes that fundamental alteration should be expressly recognized because it will play a critical role in determining what is "readily achievable" for telecommunications.

In TIA's view, the concept of fundamental alteration should be applied in the telecommunications context to identify the fundamental characteristics of a product that it is not "readily achievable" to change, including core features and price desired by the target market. TIA recognizes that expense is one of the statutory elements of the "readily achievable" definition. In TIA's view, however, the incremental cost of incorporating accessibility features into a product will not be useful unless that cost is placed in context so that its ready achievability can be assessed.

TIA's proposal is grounded upon the practical reality that telecommunications equipment and CPE are not designed, developed or fabricated in the abstract, but for a specific market segment that wants certain core features and is willing to purchase the product as long as the price falls within a very narrow range. Just as the inclusion of large buttons on the smallest wireless handset would fundamentally alter the nature of the product, which depends upon its

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[72] Appendix to 36 C.F.R. Part 1193 (comment 3 on the definition of readily achievable, § .3).

[73] *See NPRM* ¶¶ 104, 106, 113, 114.

compactness and portability for its popularity, so too, the inclusion of accessibility features that increase the price of the product beyond the price that the target market is willing to pay would fundamentally alter the nature of that product by making it unsuitable for its target market. For the same reason, manufacturers should not be required to eliminate core features that the target market wants in order to incorporate accessibility features, because the omission of those core features would similarly render the product unsuitable for its target market.

TIA's proposal would not relieve manufacturers of all obligations to include accessibility features into their products. Manufacturers will often be able to incorporate features that enhance accessibility without increasing the product price beyond what the target market will bear. Manufacturers should have the discretion to choose which access features to incorporate across a line of products with comparable features and price. This approach is most likely to promote increased access.

For example, suppose that a manufacturer is designing a cellular handset for the market segment that wants a wireless phone that also functions as a vibrating pager with caller ID. Market research demonstrates that the target market segment for this product consists primarily of factory workers in noisy environments. As part of its evaluation of accessibility features, the manufacturer considers enhanced audio for the telephony function and a zoom feature which permits increased font size on the caller ID visual display for the sight impaired. If the manufacturer includes the zoom feature, the name of the caller comes up on the display first, and then after a button is pressed, the number called from appears. The manufacturer learns, however, that most of the target market, which works in a potentially dangerous factory

environment, would not want the handset/pager if it takes an additional 10 seconds to scroll through a second screen of large type because of the zoom feature on the caller ID function.

Under these circumstances, the zoom feature should not be considered "readily achievable" for the product because it would make the product unsuitable for the market that it was designed to meet. The manufacturer should be permitted, however, to incorporate the zoom feature into a smaller subset of the handset/pager product line that is targeted at another market segment that would not be deterred from buying the product because of this feature.

E. Manufacturer.

1. Responsible Entity.

In the *NPRM*, the FCC proposes to evaluate whether it is "readily achievable" to incorporate a particular telecommunications accessibility feature into telecommunications using three factors: (1) feasibility; (2) expense and (3) practicality.[74] With regard to the element of practicality, the FCC properly notes that the "resources" of a manufacturer should be taken into consideration.[75] TIA agrees with the FCC's tentative view that the "resources reasonably available" to achieve accessibility should be taken into account and that this should be done on a case by case basis.[76] TIA disagrees, however, that the FCC should use the concept of "legal responsibility" combined with two rebuttable presumptions to make the judgment. The

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[74] *NPRM* ¶ 100.

[75] *NPRM* ¶ 109.

[76] *Id.*

presumption of the resources of a parent being available to a subsidiary, affiliate, or division will unnecessarily increase the complexity of the complaint process since many complaints will get bogged down in "rebutting" the two FCC proposed presumptions.

Large and small manufacturing entities utilize a variety of organizational structures to manufacture products. Some companies choose to have separate subsidiaries manufacture particular products or families of products while others choose to set up different divisions within a single corporate structure. Decisions on how to structure a manufacturing organization are costly and complex decisions made without regard to regulatory compliance. The parent of a subsidiary or division may ultimately be "legally responsible" for a product. However, all decisions and responsibility (including financing, product support, marketing support and similar matters) relative to whether a product is manufactured, or if manufactured, with what features and functionalities will be included in the product, will often be made by a subsidiary or affiliate.

Thus, while TIA has no objection to making case by case determinations on whether the resources of a parent should be included in evaluating whether it was "readily achievable" to incorporate a given accessibility function, it does not believe that there should be a presumption in that regard. In the alternative, the FCC should provide manufacturers and others with specific guidelines on what factors will be used in evaluating whether the resources of a parent or affiliate will be considered in making the decision.

2. "Final Assembler."

TIA agrees that the definition of final assembler includes all equipment marketed in U.S., regardless of national origin. For multiple source equipment, TIA supports the final assembler approach, i.e,. the entity that introduces the product into the market for sale in its final form. In its December, 1997 proposal to the Commission, TIA proposed to define a manufacturer of telecommunications equipment or CPE as:

> The division, business unit, subsidiary, or other business entity that is responsible for introducing, directly or through distribution agreements, related telecommunications equipment or CPE into the United States marketplace in its final form or has direct control over the design and development, fabrication, and costs and expenses associated with such products.

However, in those instances where an entity brands and markets the equipment of an unrelated manufacturer as its own, the consumer has no way of knowing the identity of the actual assembler of the product should the consumer wish to contact the manufacturer or file a complaint. In those instances, it would be easiest if potential complainants and the Commission can contact the entity whose brand name appears on the product. The responsibility for responding to a Section 255 contact or any liability resulting from noncompliance can be apportioned by the firms contractually prior to introducing the product into the market. This approach will permit consumers to continue to have a single point of contact for any piece of equipment in the market.

IV. THE FCC SHOULD INTERPRET SECTION 255 IN A MANNER THAT IS CONSISTENT WITH THE LIMITATIONS ON THE FCC'S AUTHORITY REFLECTED IN THE COMMUNICATIONS ACT.

A. Section 255 Applies Only to Providers of Telecommunications Services and Not Information Services.

In the *NPRM*, the Commission correctly observes that compliance with Section 255(c) is required only by telecommunications providers supplying "telecommunications services."[77] Providers supplying non-telecommunications services (*i.e.*, services not meeting the statutory definition) are not subject to Section 255. Indeed, the Commission's interpretation is consistent with the language of Section 255(c), which refers to a provider of "telecommunications service."[78]

It would be inconsistent with both the legislative history and language of the Telecommunications Act of 1996 to apply Section 255(c) to providers of non-telecommunications services, such as providers of cable services or the private mobile radio service ("PMRS").[79] First, in Section 255, Congress relied on well-defined terminology to

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[77] *NPRM* at ¶ 46.

[78] Section 255(c) states: "A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable." 47 U.S.C. § 255(c). "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[79] *NPRM* at ¶ 46.

delimit the section's coverage.[80] Thus, telecommunications services are specifically covered, while information services are not.

Additionally, Section 255, which is located in Title II of the Act which applies to common carriers, was not intended to apply to providers of non-telecommunications services or a non-common carrier service. Had Congress intended to apply Section 255 to both common carriers and non-common carriers, it would have placed the language of current Section 255 in Title I of the Act, *i.e.*, "General Provisions." Thus, by including Section 255 in Title II, Congress decided to limit its access requirements to common carriers and providers of telecommunications services.

Consistent with this interpretation of the statutory language, TIA also supports the Commission's initial conclusion that "'[i]nformation services' are excluded from regulation" under Section 255.[81] Indeed, a conclusion that information services are covered by Section 255 would directly contradict the conclusions recently reached by the Commission in its report to Congress concerning Universal Service.[82] In this Report, the Commission addressed "head-on" the issue of whether information services were a type of telecommunications service, as defined under the Telecommunications Act of 1996. In the Commission's words:

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[80] *See* 47 U.S.C. § 255(c): "Telecommunications Services – A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."

[81] *Id.* at ¶ 36.

[82] *See Federal-State Joint Board on Universal Service*, Report to Congress, FCC 98-67 (rel. April 10, 1998)("*Universal Service Report*").

> After careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of "telecommunications services" and "information service" in the 1996 Act are mutually exclusive.[83]

Further, the Commission concluded that subjecting information services to Title II constraints, which are reserved for telecommunications carriers providing telecommunications services, would be detrimental to the information service industry:

> We note that our interpretation of "telecommunications services" and "information services" as distinct categories is also supported by important policy considerations. An approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.[84]

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[83] *Id.* at ¶ 39. "The language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as mutually exclusive categories." *Id.* at ¶ 43. As the Commission observed in the *Universal Service Report*, the House Bill explicitly stated: "The term 'telecommunications service' does not include an information service." *Id.* Further, the Senate Report "stated in unambiguous terms that its definition of telecommunications 'excludes those services. . . that are defined as information services." *Id.*

[84] *Id.* at ¶ 46. "Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the 'telecommunications carrier' classification would effectively impose a presumption in favor of Title II regulation of such providers." *Id.* at ¶ 47. "The classification of information service providers as telecommunications carriers, moreover, could encourage states to impose common-carrier regulation on such providers." *Id.* at ¶ 48. Clearly, the Commission regards information services as distinct from the common carrier telecommunications services subject to Section 255.

An interpretation that "information services" are covered by Section 255 would contradict the Commission's conclusion in the *Universal Service Report*. Such an interpretation would also subject information services to an obligation under Title II – a result the Commission explicitly sought to avoid. Further, subjecting information services to Section 255 would place in doubt the Commission's conclusions in other proceedings with regard to the regulatory distinction between information and telecommunications services.[85] The Commission should endeavor to remain consistent in its interpretation of the terms "telecommunications services" and "information services."

Regardless of whether Congress had "broad objectives" for Section 255 or not, the language it used in setting forth those objectives clearly indicates that its scope is limited to "telecommunications services."[86] If Congress wanted information services to be covered, it would have said so explicitly. Instead, it only used the term "telecommunications services," a term it has defined separately from "information services."

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[85] *See, e.g., Amendment of the Commission's Rules and Regulations Governing Pole Attachments*, Report and Order, Further Notice of Proposed Rulemaking, CC Docket No. 97-151 at ¶ 33 (rel. Feb. 6, 1998) (finding that Internet access service does not constitute a telecommunications service); *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, FCC 98-27 at ¶ 46 (rel. Feb. 26, 1998) ("Commission precedent has treated 'information services' and 'telecommunications services' as separate, non-overlapping categories, so that information services do not constitute 'telecommunications' within the meaning of the 1996 Act.").

[86] *NPRM* at ¶ 42 ("Given the broad objectives Congress sought to accomplish by its enactment of Section 255, we seek comment on whether Congress intended Section 255 to apply to a broader range of services.").

B. Equipment Must Comply With Section 255 Only to the Extent It is Being Used In Connection with Telecommunications Services.

TIA agrees with the Commission that it is important to delineate precisely what kinds of telecommunications equipment and CPE are subject to the requirements of Section 255. It is imperative that clear distinctions are made so that manufacturers know their obligations. Accordingly, TIA supports the Commission's conclusion that equipment manufactured for services that "[do] not appear to fall within the scope of Section 255" (*i.e.*, non-telecommunications services or non-common carrier services) does not need to be manufactured in accordance with Section 255(c).[87]

TIA notes that the term "telecommunications equipment" is defined by Congress as equipment that is used for telecommunications services:

> The term 'telecommunications equipment' means equipment, other than customer premises equipment, used by a carrier to provide **telecommunications services**, and includes software integral to such equipment (including upgrades).[88]

Further, in TIA's view, the Commission correctly refers to CPE with respect to "telecommunications services" as well.[89] As a result, if the subject equipment is not used for

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[87] *Id.* at ¶ 53.

[88] *See* 47 U.S.C. § 153(45) (emphasis added).

[89] *See NPRM* at ¶ 49 ("In short, to the extent end users must interact with equipment to use telecommunications services, Section 255 applies."). Indeed, the term CPE was created and has traditionally been used in the context of equipment used to facilitate common carrier services. *See, e.g., In the Matter of Amendment of Section 64.702 of the Commission's Rules and* (Continued ...)

telecommunications services or common carrier services, then it is not "telecommunications equipment" or "CPE" and is not subject to the access requirements of Section 255(b).[90] For example, equipment manufactured exclusively for use in connection with PMRS (*i.e.*, a non-telecommunications service) should not be covered by Section 255(b). While TIA's members are prepared to produce its telecommunications equipment and CPE in compliance with the Telecommunications Act of 1996 , it agrees with the Commission that equipment manufactured for non-telecommunications services does not need to be produced in conformity with Section 255.

Regulations (Second Computer Inquiry), Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512 n.1 (1981)("For purposes of this docket, customer-premises equipment includes all equipment provided by common carriers in the fifty states, the District of Columbia, Puerto Rico and the Virgin Islands and located on customer premises except over voltage protection equipment, inside wiring, coin-operated or pay customer.").

[90] As proposed by TIA in its comments in the Commission's CC Docket No. 96-254 proceeding to implement section 273 of the 1996 Act, the Commission should establish a clear rule that the development of any firmware or software for hardware that "performs the function(s) of telecommunications equipment" should be considered "integral" to that equipment and therefore included in the definition of telecommunications equipment for purposes of Section 255. The *NPRM* correctly points out that the definition of CPE does not include software and that software, marketed separately from CPE, to be used in CPE is not subject to section 255. *NPRM* at ¶ 56. TIA agrees that a manufacturer is responsible for the functional accessibility of CPE, where readily achievable, to the extent it serves a telecommunications function. The role that software in CPE plays to create accessibility should be left to the manufacturer. A manufacturer should be able to make its CPE accessible, when readily achievable, by whatever means is most practicable. Whether a modification to software is the most appropriate way to achieve accessibility, or some alternative approach is preferable, should be left to the manufacturer's discretion.

C. The Intent of the Manufacturer Must Be Considered in Determining Whether to Apply Section 255(c) to "Multi-Use" Equipment or Equipment That is Used Incidentally for a Telecommunications Service.

As to equipment that is capable of performing both telecommunications services and non-telecommunications services (*i.e.*, multi-use equipment), the Commission proposes to apply Section 255 "only to the extent the equipment serves a telecommunications function."[91] Related to this proposal, the Commission seeks comment on the obligation of a manufacturer which produces equipment intended for a non-telecommunications service application, but finds that the equipment is being used in connection with a telecommunications service subject to Section 255.[92] For example, the Commission notes, "unlicensed devices regulated under Part 15 of the Commission's Rules may be used as part of a telecommunications service, as where a wireless local area network is interconnected with the pubic switched network and offered to subscribers for a fee."[93]

TIA believes that the appropriate test for deciding whether multi-use equipment, such as the unlicensed Part 15 device cited by the Commission, must comply with Section 255 rests with the intent of the manufacturer in producing the equipment. TIA does not disagree with the Commission that if an equipment manufacturer produces a device intended to be used with both telecommunications *and* non-telecommunications services, the device is subject to Section 255 to the extent it is used to provide telecommunications services.

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[91] *NPRM* at ¶ 53.

[92] *Id.*

[93] *Id.* at ¶ 53 n. 117.

The Commission must recognize, however, that it is theoretically possible for most equipment that is designed for (and is expected to be used solely with) a private network also to be used to provide a telecommunications service. Accordingly, if the Commission applies a "possibility" standard (*i.e.*, if it is "possible" to use a particular device with a telecommunications service then it must be subject to Section 255), virtually all equipment that transmits and receives data would be subject to compliance with Section 255, regardless of whether the device was originally manufactured for use with a non-telecommunications service or not.

For example, a telephone not registered under Part 68 of the Commission's Rules can be legally connected to a private telephone network, such as an intercom system or a retirement community local area telephone network. So long as neither the telephone itself nor the network is being used in connection with a telecommunications service, Section 255 would not apply. If, on the other hand, the telephone were even capable of being removed from the private network and used in connection with a telecommunications service, it would be under the "possibility" test fully subject to Section 255.

The manufacturer of such a telephone, and analogous devices, is faced with a dilemma. It must either produce the telephone, intended solely for connection to a private network, with the appropriate Section 255 features and compete against other comparable telephones in the marketplace, which are not subject to Section 255; or it must face the possibility that an action over which it has no control will require it to defend itself against a complaint alleging a violation of Section 255 by a user who, for example, interconnects an

unregistered intercom telephone to the PSTN and uses it in connection with a telecommunications service.

This choice for manufacturers is not indicated in the legislative history underlying Section 255. Indeed, by its own terms the statute provides that telecommunications equipment and customer premises equipment need be designed and developed for compliance with Section 255 only if such compliance is "readily achievable." TIA believes that designing and developing devices to assure compliance under all imaginable circumstances, including misapplication and unintended incidental use, does not constitute "readily achievable" within the meaning of Section 255. As a policy matter, the difficulty and expense of conceiving all of these potential uses, as well as the expense associated with ensuring compliance of all equipment, including equipment for non-telecommunications services and telecommunications services, would be excessive and beyond the "readily achievable" standard.

TIA believes that a device manufactured with the primary intent for use with a non-telecommunications service should not be subject to Section 255, even if there is a conceivable use of the equipment with telecommunications services. It would be difficult, if not impossible, to expect every manufacturer to make *a priori* determinations regarding the potential for misapplication of devices intended solely for use in a private or non-telecommunications service environment. While TIA fully supports the purposes of Section 255, it strongly believes that it and other manufacturers should not be held responsible for unlawful or unintended applications of their products.

The Commission should not be concerned that equipment used with non-telecommunications services will not be accessible to persons with disabilities. While Section 255 of the Act may not apply to that equipment, the ADA places an affirmative obligation on employers to ensure that an alternative arrangement is made so that persons with disabilities are able to perform the essential functions of their positions.[94]

V. IMPLEMENTATION PROCESS.

TIA agrees that the Commission's overarching goal for Section 255 implementation should be a process which ensures that more accessible telecommunications equipment and CPE is introduced into the marketplace. TIA also agrees that complaints should (1) be resolved with a minimum of government interference; (2) be responsive to those who are aggrieved by a lack of accessibility; and (3) efficiently allocate resources to avoid undue burdens being placed on the Commission, manufacturers and persons with disabilities.[95] Review of the proposals described in the *NPRM*, however, does not demonstrate that the Commission will accomplish its goal. Specifically, the proposed "fast track" complaint process does not provide consumers or manufacturers with sufficient opportunity or time to engage in meaningful dialogue which will reduce the number of informal or formal complaints filed under Section 255. The fast track process puts consumers and manufacturers in a defensive, litigious frame of mind

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[94] 42 U.S.C. § 12112(b)(5)(A).

[95] *NPRM* ¶ 124.

from the outset which is neither conducive to the resolution of differences between consumers and manufacturers nor productive with regard to enhancing the overall accessibility of telecommunications and CPE.

A. Fast Track Process.

The Commission's fast track complaint process appears to have been modeled after an informal dispute resolution process ("DRP") process developed by TIA and discussed with the Staff of the Commission in December, 1997.[96] As will be described in detail below, the TIA DRP proposal is superior to the fast track process because it requires the parties to engage in a mandatory 60 day dispute resolution process before the FCC will even consider accepting a Section 255 informal or formal complaint. The 60 day process is sufficiently long to encourage dialogue between a person with a disability and a manufacturer which will lead to a better and more fully developed understanding of the nature of the problem a person with a disability has in

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[96] At the request of the staff of former Chairman Hundt, TIA was requested to develop a proposal for implementing the Commission's obligations under Section 255. The proposal was designed to be a starting point for discussion between consumers and manufacturers in an attempt to reach consensus on issues related to Section 255. TIA's "Proposal for FCC Guidelines Implementing Section 255 of the Communications Act" and the accompanying "Explanation and Supporting Rationale" was presented to the Staff of the Wireless Telecommunications Bureau and the FCC's Disability Task Force in December, 1997. *See* Appendix B. Though not formally submitted in the record of the NOI leading up to this NPRM, it was provided to members of the disability community, including the National Association of the Deaf, the National Association of the Blind, the United Cerebral Palsy Association, the American Foundation for the Blind, the World Institute on Disability, Self Help for Hard of Hearing People, the American Council of the Blind, the Gallaudet University Assistive Technology Research Center.

using a given product.[97] The TIA proposal is likely to lead to resolution of a large number of non-frivolous, perceived violations of Section 255 without FCC intervention.

Under the Commission's fast track complaint process the Commission proposes that: (1) manufacturers be required to provide the FCC with a point of contact for inquiries and complaints relative to Section 255 issues; (2) potential complainants be "encouraged" but not "required" to first discuss an alleged lack of accessibility with a manufacturer; (3) standing need not be established to file a Section 255 complaint (fast track or otherwise); (4) no specific format be used for filing a Section 255 complaint; (5) complaints be distributed to manufacturers within 1 day of receipt; (6) manufacturers be required to respond to fast track complaints within 5 business days of the date the FCC forwards the complaint (with extensions of time contemplated to the extent reasonable efforts are being made to resolve the dispute); (7) outside sources be used by the Commission in rendering a decision on a fast track complaint; and, (8) there be some mechanism for the parties to a fast track complaint to switch out of the fast track process before it is completed and to proceed to the Commission's informal or formal complaint resolution process. The underlying concept of trying to dispose of complaints in a less formal process before more formal procedures are used is a sound framework. However, the fast track process needs to be eliminated if the Commission is to be successful in meeting its multiple goals of resolving complaints with minimum interference; getting accessible product into the

[97] Of course, the goal of TIA's members is to address and resolve perceived access problems as quickly as possible, and thus may not require the full 60 day period in every case. However, TIA believes the 60 day period is necessary since some Section 255 complaints are certain to be complex.

marketplace as quickly as possible; being responsive to persons with disabilities; and conserving the resources of all parties involved.

1. Encouragement of Informal Dialogue Between Interested Parties.

In the *NPRM* the Commission proposes to "encourage" consumers to contact the manufacturer directly before filing a complaint under Section 255, noting that this is consistent with the TAAC Report.[98] TIA asserts that the Commission should do more than "encourage" members of the public to discuss accessibility problems with manufacturers before they file complaints. The FCC should "require" consumers to discuss accessibility problems with manufacturers and allow the parties sufficient time to try and resolve the issues before the FCC becomes involved in the dispute resolution process.[99] This will enhance the possibility that the potential complainants and manufacturers can voluntarily resolve the issues in question without involving the use of scarce Commission resources. Indeed, many "complaints" may not be complaints at all but rather inquiries consumers make about specific products and accessibility features, such as, for example, a consumer needing assistance on how to utilize the "zoom" feature[100] on the visual display of a pager. Intervention by the Commission in matters which are

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[98] *NPRM* ¶ 128.

[99] It is entirely appropriate for a consumer to seek, and the FCC to provide, the point of contact information for a manufacturer to facilitate the initial contact between the consumer and the manufacturer.

[100] A "zoom" feature allows the user of a device to increase the font size of characters on a visual display.